

State of Maryland  
State Higher Education Labor Relations Board

In the matter of:	)	
	)	
Fraternal Order of Police Lodge 82,	)	
	)	
Petitioner	)	SHELRB UC Case No. 2005-03
	)	
v.	)	Opinion No. 20
	)	
University of Maryland Baltimore County	)	
	)	
Respondent	)	

DECISION AND ORDER OF REMAND

*Summary of Case:*

This unit clarification case comes before the State Higher Education Labor Relations Board ("SHELRB"), on review of a decision by the Office of Administrative Hearings ("OAH"), in which the OAH recommended granting the motion of the University of Maryland Baltimore County ("UMBC") for summary disposition. After hearing argument on the motion and considering documentary evidence, the administrative law judge ("ALJ") found that the petitioned for Sergeants were supervisors and that there was no genuine issue of material fact as to their supervisory status. Accordingly, the ALJ found, as a matter of fact and law, that the Sergeants were excluded from the unit and recommended dismissing the petition. For the reasons stated below, we reverse the recommended decision of the OAH and remand the case to the OAH for further hearings consistent with this decision.

*Procedural History:*

On June 6, 2005, the Fraternal Order of Police Lodge 82 ("FOP" or "Petitioner") filed a unit clarification petition against UMBC with the SHELRB. The FOP's petition requests that sworn members of UMBC's police department holding the rank of Sergeant, classified as University Police Officer IV ("Sergeant"), be included within the bargaining unit. On June 17, 2005, the Respondent filed a response to the FOP's petition and a motion for summary judgment. In the motion, filed before the Executive Director of the SHELRB, UMBC alleged that the Sergeants are supervisors and are therefore, statutorily excluded from the bargaining unit under State Personnel and Pensions Article Section 3-102(b)(12). Md. Code Ann., State Pers. & Pens. Sect. 3-102(b)(12) (2004). The Executive Director of the SHELRB dismissed that motion on

July 27, 2005, for administrative reasons, on the grounds the case was in the investigative phase and that the Executive Director had no authority to consider the motion at that time.

On August 4, 2005, the SHELRB delegated authority to the OAH to conduct a hearing regarding the FOP's petition. The scope of authority delegated to the OAH was limited to issuance of final finding of fact, proposed conclusions of law and a proposed order, regarding the FOP's petition.<sup>1</sup> On November 1, 2005, UMBC filed a summary disposition motion with the OAH.

Following a hearing on the motion for summary disposition, on December 20, 2005, the ALJ issued a proposed ruling, finding that "there are no material facts in dispute that warrant a hearing regarding the FOP's petition for inclusion of Sergeants in the bargaining unit," and therefore recommending that the summary disposition motion be granted and the case be dismissed.

*Decision:*

We disagree with the ALJ's recommendation for a number of reasons. First, we find that the ALJ exceeded her authority in deciding the summary disposition motion. As noted above, the SHELRB delegation to the OAH was specifically to conduct a hearing and make factual findings, conclusions of law and a proposed order on the FOP's petition for unit clarification. Thus, the OAH was not authorized to decide this motion and should have sent it back to the SHELRB for further instructions.<sup>2</sup>

Second, even assuming the ALJ had authority to decide the summary decision issue, we find that the ALJ erred as a matter of law in finding that there was no genuine issue of material fact to resolve. As the Supreme Court made abundantly clear in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001), determinations of supervisory status are complex and fact-intensive. As such, supervisory issues are not the types of cases that are appropriate for summary disposition. Instead, the judge must consider actual testimony from the witnesses as to what their duties are, not just representations of those duties on paper.

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<sup>1</sup>The SHELRB order delegating authority read as follows:

Pursuant to Title 10 of the State Government Article, §10-205(a)(ii)(1) and COMAR Title 14, Subtitle 11, §§ .03A, .03B, and .23, the State Higher Education Labor Relations Board (SHELRB) hereby delegates its authority to hold hearings, pursuant to Title 3 of the State Personnel and Pensions Article, §3-2A-07(b), to the Office of Administrative Hearings (OAH) for the above-referenced contested matter. The scope of the authority delegated is limited to: (1) final findings of fact; (2) proposed conclusions of law; and (3) proposed order.

<sup>2</sup> We recognize that, under our regulations, the OAH (through its ALJs) has authority to decide summary disposition motions. Md. Code Ann., Title 14, Independent Agencies, § 14.30.13(C)(2). However, they may do so only when delegated by the SHELRB. In the future, the OAH should ask for clarification as to whether they have been delegated such authority, rather than doing so on their own authority.

In this case, instead of undertaking a meaningful evaluation of the Sergeants' actual duties, as it had been charged by the Board to do, the judge only considered the self-serving affidavits of UMBC, describing the duties of the Sergeants. Crediting these affidavits, the judge then shifted the burden of proof to the FOP to rebut that evidence with more affidavits in support of its assertion that the Sergeants did not exercise any meaningful supervisory authority. Because the FOP failed to produce such affidavits, the judge ruled against the FOP.

We find that the ALJ inappropriately shifted the burden onto the FOP to disprove supervisory status (through written affidavits) at the summary disposition stage of the proceedings. Instead, the judge should have only determined whether the FOP met its burden of demonstrating that there was a genuine issue of material fact.<sup>3</sup> As the ALJ noted in her decision, the Petitioner did assert that the Sergeants did not exercise independent judgment in performing their duties because their decisions were subject to review by superior officers. This assertion was enough to create a triable factual issue.<sup>4</sup>

Accordingly, we remand the case to the OAH to conduct a hearing on the merits of whether the Sergeants are supervisors, paying particular attention to the actual duties performed by the Sergeants, based upon testimony as well as documentary evidence, and the issue of whether they exercised independent judgment in performing those duties.

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<sup>3</sup> We note that, under National Labor Relations Board Rules, the party opposing summary judgment is not required to submit affidavits in an unfair labor practice case because the parties are not expected to conduct prehearing discovery. See *Postal Service*, 311 NLRB 254 (1993)(NLRB denied summary, citing NLRB Rules and Regulations, Sec. 102.24(b)). On the other hand, the Maryland Rules require that the party opposing summary judgment submit affidavits to support the motion. Md. Code Ann., Title 2 Civil Procedure, Rule 2-501(b). The SHELRB is not bound by either the NLRB rules or the Rules governing the state Courts of Maryland; however, we acknowledge the countervailing policy considerations behind both sets of rules. While we find that the FOP's counsel would have been well advised to support its assertion with an affidavit, the lack thereof does not create a failure of proof at this stage in the proceedings. As noted above, such issues are only appropriately resolved by a full hearing, rather than on an affidavits.

<sup>4</sup> We also take issue with the ALJ's attempt to distinguish the Board's decision in *Bowie State University v. Maryland Classified Employees Association, Inc.*, SHELRB EL Case No. 2001-12/01 (Opinion No. 13). We find that the *Bowie State* case underscores the need for a full hearing in this case. In that case, the SHELRB found that there was insufficient evidence that an identically-ranked Sergeant exercised independent judgment in the exercise of his duties to be excluded from the bargaining unit as a supervisor. The ALJ tried to distinguish the *Bowie* case on the grounds that affidavits as to the officers' duties were presented in that case from the Petitioner. However, in the *Bowie State* case, the Board ruled on the supervisory issue only after a full hearing with testimony and affidavits. Thus, such a comparison is inappropriate at the summary judgment stage, where the Petitioner was not required to submit affidavits or to give testimony.

ORDER

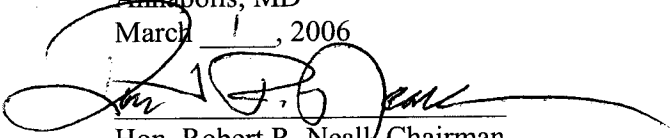
IT IS HEREBY ORDERED THAT:

The Unit Clarification Petition in Board Case Number 2005-03 is remanded for a hearing, final findings of facts, proposed conclusions of law and a proposed order, consistent with this Decision.

BY ORDER OF THE STATE HIGHER EDUCATION LABOR RELATIONS BOARD

Annapolis, MD

March 1, 2006



Hon. Robert R. Neall, Chairman